BANK PEMBANGUNAN MALAYSIA BHD v. SPRING HILL BIOVENTURES SDN BHD

COURT OF APPEAL, PUTRAJAYA
AHMADI ASNAWI JCA
AB KARIM AB JALIL JCA
SURAYA OTHMAN JCA
[CIVIL APPEAL NO: W-02(NCC)(W)-1721-08-2017]
3 FEBRUARY 2020

CONTRACT: *Loan – Guarantee – Bank gave loan facilities to borrower – Surety gave letters of undertaking ('LOU') to bank for facilities – Borrower defaulted in repayment – Bank terminated facilities and demanded for payments from borrower – Whether LOUs contracts of guarantee or contracts of indemnity – Whether necessary to prove that principal debtor/borrower expressly requested surety to act as surety – Whether surety had discharged obligation under first LOU as result of variation to offer letter – Whether surety had been discharged of liability under second LOU following variation to LOU for all transactions subsequent to variation – Whether bank obliged to notify surety that borrower defaulted and demand payment within tenure of loan facilities – Contracts Act 1950, ss. 79, 86, 88 & 89*

The appellant had given two term loan facilities ('TLF') to the borrower, Alpha Biologics Sdn Bhd ('ABSB') and the surety, the respondent, gave two letters of undertaking ('LOU') to the appellant for these TLFs. The first TLF was in the amount of RM20 million while the second TLF was in the amount of RM10 million. The appellant requested for ABSB to make payments due to the appellant in the sums of RM4,090,115.84 and RM532,019.69 under the first and second TLFs, respectively (totaling to RM4,622,135.53). The appellant further notified ABSB that (i) ABSB was in default of its repayment obligations under the first and second TLFs; and (ii) ABSB was further indebted to the appellant in the sums of RM4,599,422.69 and RM759,042 under the first and second TLFs, respectively (totaling to RM5,358,465.52). The appellant once again notified ABSB that the latter was further indebted to the appellant in the sums of (i) RM11,376,366.49 and RM2,480,007.95 under the first and second TLFs, respectively; and (ii) RM138,447.53 under a third TLF, which the respondent had no knowledge of. The letters were addressed to ABSB and not the respondent. The appellant finally issued a letter of termination ('LOT') to ABSB, demanding for payment of RM31,908,811.70. The LOT was copied to the respondent but no demand was made against it. However, the appellant later issued a letter of demand ('LOD'), pursuant to the two LOUs to the respondent for the sums of RM35,741,572.62 and RM1,940,567.86 under the first and second TLFs, respectively. A month later, a second LOD was issued to the respondent, demanding for the same. The appellant commenced a claim, at the High Court, for the sums under the first and second TLFs against ABSB and the respondent. Since ABSB was wound up and did not defend the claim, the suit proceeded against the respondent, premised on the LOUs. At the conclusion

of the trial, the High Court held that (i) the LOUs were contracts of guarantee under s. 79 of the Contracts Act 1950 ('Act'); (ii) the respondent had completely discharged its obligation under the first LOU as a result of a variation to the LO and s. 88 of the Act applied; (iii) the respondent had been discharged of its liability under the second LOU following the variation to the LOU for all transactions subsequent to the variation; and (iv) the appellant was obliged to notify the respondent that ABSB had defaulted and demand payment within the tenure of the first and second TLFs. The High Court then gave the following orders: (i) the appellant' s claim against the respondent, under the first TLF, was dismissed; (ii) in relation to the appellant's claim against the respondent under the second TLF, the respondent was released from the liabilities with effect from the date of variation of the second TLF; (iii) the respondent was ordered to pay RM932,472.10 under the second TLF; and (iv) the appellant was ordered to pay costs to the respondent.

Hence, the present appeal. In support of its appeal, the appellant submitted that: (i) the LOUs constituted contracts of indemnity under s. 77 of the Act, not contracts of guarantee under s. 79 of the Act; (ii) the Indian authorities on guarantee, under s. 126 of the Indian Contracts Act, which is in *pari materia* to s. 79 of the Malaysian Contracts Act 1950, shows that in order to constitute a contract of guarantee, it is necessary to prove that the principal debtor/borrower had expressly requested the respondent to act as surety. In the instant case, there was no such request from ABSB to the respondent and, as such, the letters were not letters of guarantee; (iii) since the LOUs were letters of indemnity, the issue of the surety being discharged under s. 86 of the Act, which section is applicable only to contracts of guarantee, did not arise; and (iv) on the issue of notification, in that the appellant was obliged to notify the respondent that ABSB had defaulted and the demand for payment from the respondent must be within the tenure of the first and second TLFs, the appellant argued that the LOUs did not impose such an obligation. The respondent, on the other hand, argued that (i) the LOUs were contracts of guarantee under s. 79 of the Act; (ii) there was no requirement under s. 79 of the Act that, to constitute a guarantee, there must be an express request from ABSB to the respondent to be its surety; (iii) since the requirements of a guarantee were met, the LOUs were letters of guarantee and the respondent was discharged from its liabilities under ss. 86 to 89 of the Act as a result of the variations made between the appellant and ABSB in that the appellant had unlawfully varied the first and second letters of guarantee without the knowledge and consent of the respondent; and (iv) the appellant failed to notify the respondent of the existence of ABSB's default during the tenure of the TLFs. According to the respondent, the appellant's failure had discharged the respondent especially so when the demands made to the respondent for the payment of the full facilities were made after the termination and recall of the facilities and, without any prior notification to the respondent of the default by ABSB during the subsistence of the facilities.

Held (allowing appeal in part)
Per Suraya Othman JCA delivering the judgment of the court:

(1) The LOUs were not expressly termed as guarantees. To determine whether the LOUs were letters of indemnity or guarantee, guidance can be sought from ss. 77 and 79 of the Act. Section 77 of the Act defines a contract of indemnity while s. 79 defines a contract of guarantee. Under s. 77 of the Act, a 'contract of indemnity' is a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person. A contract of indemnity is to be nothing more than 'a contract by one party to keep the other harmless against loss'. It is a contract to indemnify the other party against any loss and the obligation has no reference in law to the debt of another. Under a contract of guarantee, there must be three parties involved: the surety, the principal debtor/borrower and the creditor. A contract of guarantee is therefore an undertaking to guarantee the obligations of a named principal. In this regard, a contract of guarantee is essentially a collateral contract by which a guarantor/surety undertakes to answer for the default of the principal debtor/borrower who is to be primarily liable to the creditor. The guarantor only owes a secondary obligation to the creditor to make good the particular defaults of the principal debtor. (paras 30-32)

(2) The HCJ (i) rightfully found that s. 79 of the Act does not require an express third contract between the principal debtor, ABSB, and the surety, the respondent, for it to constitute a contract of guarantee; and (ii) correctly inferred, by looking at the LO from the appellant, which was addressed to ABSB, that it was the appellant who made the request to ABSB to provide the LOUs and not the appellant who made the request directly to the respondent. By implication, the HCJ correctly inferred to come to the conclusion that the suretyship must have been undertaken at the request of ABSB. This satisfied the requirement that the request from the principal debtor or borrower to the surety need not be done expressly but could be implied, as in this case, from the surrounding circumstances of the case. The HCJ had not erred, but was correct in finding that ABSB impliedly requested the respondent to stand as guarantor/surety to the TLFs taken by them from the appellant and, as such, the requirement for a contract to be defined as a contract of guarantee had been fulfilled. (paras 41 & 47)

(3) As to the construction of the letter of indemnity, the HCJ correctly found that although the LOUs employed the phrase '... we hereby declare, confirm and undertake ...', what was important was the purport of the letter, which was in fact that of a contract of guarantee pursuant to s. 79 of the Act. Construing the LOUs as a whole, the commercial purport of the documents was that the respondent, in consideration of the appellant making available the facilities to ABSB, undertook to cover any shortfalls and meet all repayments under the two TLFs. The

HCJ was correct to find the LOUs to be letters of guarantee. The obligation to pay by the respondent rested upon a demand being made by the appellant to the respondent. The HCJ was wrong in finding that the appellant must notify the respondent of ABSB's default. The LOUs did not impose an obligation to give such notice to the respondent of ABSB's default. The fact that no notices were given was not fatal. Sufficed that a demand was made to the respondent. In this case, the demand by the appellant to the respondent was made on 6 June 2016, two years after the appellant terminated the contract and recalled the facilities on 31 July 2014. The obligation to pay by the appellant arose only from that date, *ie*, 6 June 2016. (paras 48 & 49)

(4) The question or the real issue was whether the respondent's remaining liability was discharged under s. 88 of the Act. The authorities on s. 135 of the Indian Contracts Act which is in *pari materia* with s. 88 of the Malaysian Contracts Act 1950 indicate that the giving of time or indulgence alone does not attract s. 88 of the Act. The rationale under s. 88 of the Act is that the surety/guarantor is discharged if 'the guarantor/surety's position is altered to his detriment without his assent'. The respondent's obligation under the first LOU occurred when there was a 'shortfall in the obligations of the borrower during the tenure of the term loan and to meet all repayments under the term loan in the event the borrower is unable to meet its debt obligations under the loan agreement executed or to be executed between the borrower and you'. (paras 58 & 61)

(5) When the appellant extended the grace or moratorium period and extended time for the principal repayment, the appellant could not call on the respondent to make payment until the extended period had lapsed. Consequently, the appellant could never call on the respondent to make payment under the first undertaking before the extended grace period and extended time for the principal repayment had lapsed. The respondent would have to wait until the 49th month to sue ABSB. In such a scenario, the variation had no impact on the respondent's right to sue under the first TLF. What happened was just that the right to sue had been deferred to a later date. In such circumstances, the more suitable provision to invoke was s. 86 of the Act on variation, and not s. 88, in that the respondent was thus discharged/released from liabilities not completely but with effect from the date of variation of the first TLF. (paras 62 & 63)

(6) The appellant's appeal with regard to the first TLF was allowed in part. The order of the High Court dismissing the appellant's claim pertaining to the first TLF was set aside. Consequently, like the second TLF, due to the variation by the appellant which was without the consent of the respondent, the respondent was discharged/released from liabilities with effect from the date of variation of the first TLF, under s. 86 of the Act. (para 64)

Case(s) referred to:

Addiscombe Garden Estates Ltd v. Crabbe [1958] 1 QB 513 ***(refd)***
Amrit Lal Goverdhan Lalan v. State Bank Of Travancore & Ors AIR 1968 SC 1432 ***(refd)***
Bank of Credit and Commerce International SA v. Ali & Ors [2002] 1 AC 251 ***(refd)***
Bekalan Sains P&C Sdn Bhd v. Bank Bumiputra Malaysia Bhd [2011] 1 LNS 232 CA ***(refd)***
Bon Chong Hing & Anor v. Gama Trading Company (Hong Kong) Ltd [2011] 6 CLJ 493 CA ***(refd)***
Cipta Cermat Sdn Bhd v. Perbandaran Kemajuan Negeri Kedah [2007] 1 CLJ 498 CA ***(refd)***
Citibank NA v. Ooi Boon Leong & Ors [1980] 1 LNS 168 FC ***(refd)***
Clipper Maritime Ltd v. Shirlstar Container Transport Ltd (The Anemone) [1987] 1 Lloyd's Rep 546 ***(refd)***
Davys v. Buswell [1913] 2 KB 47 ***(refd)***
Ginlon (M) Sdn Bhd v. MBf Finance Bhd [2004] 2 CLJ 169 CA ***(refd)***
Harburg India Rubber Comb Co v. Martin [1902] 1 KB 778 ***(refd)***
Janwatraj v. Jethmal AIR [1958] Raj 343 ***(refd)***
KV Periyamianna Marakkayar & Ors v. Banians And Co AIR 1926 Mad 544 ***(refd)***
Leong Weng Choon v. Consolidated Leasing (M) Sdn Bhd [1998] 3 CLJ 619 CA ***(refd)***
Malayan Banking Bhd v. PK Rajamani [1994] 2 BLJ 166 SC ***(refd)***
Nagpur Nagarik Sahakari Bank Ltd v. Union of India 1881 SCC Online AP 19 ***(refd)***
Pau Ngie Siong & Anor v. Kontiki Trading Pte Ltd [2000] 3 CLJ 560 FC ***(refd)***
Polak v. Everett [1876] 1 QBD 669 ***(refd)***
Ramchandra B Loyalka v. Shapurji N Bhownagree AIR [1940] Bom 315 ***(refd)***
Rouse v. Bradford Banking Co [1894] 2 Ch 32 ***(refd)***
Sia Siew Hong & Ors v. Lim Gim Chian & Anor [1996] 3 CLJ 26 CA ***(refd)***
South East Asia Insurance Bhd v. Nasir Ibrahim [1992] 4 CLJ 1801; [1992] 1 CLJ (Rep) 295 SC ***(refd)***
The Pacific Bank Bhd v. Vimla Textiles & Ors [2004] 6 CLJ 406 HC ***(refd)***
Total Oil Products (Australia) Pty Ltd v. Robinson [1970] 1 NSWR 701 ***(refd)***
Woo Yew Chee v. Yong Yong Hoo [1978] 1 LNS 240 FC ***(refd)***
Yeoman Credit Ltd v. Latter [1961] 1 WLR 828; [1961] 2 All ER 294 ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 77, 79, 86, 87, 88, 89

Contracts Act [India], ss. 126, 135

Other source(s) referred to:

Lee Mei Pheng, Detta Samen & Ivan Jeron Detta, *Banking Law*, 4th edn, LexisNexis, p 873

For the appellant - Andrew Chiew & Wong Han Wey; M/s Lee Hishammuddin Allen & Gledhill
For the respondent - Peter Justin Skelchy & Nuraini Ali; M/s Cheah Teh & Su

[Editor's note: For the High Court judgment, please see Bank Pembangunan Malaysia Berhad v. Alpha Biologics Sdn Bhd & Anor [2018] 1 LNS 1126 (overruled in part).]

Reported by Najib Tamby

JUDGMENT

Suraya Othman JCA:

Introduction

[1] The appellant Bank Pembangunan Malaysia Berhad, the creditor in this case brought a claim against the first defendant Alpha Biologics Sdn Bhd as principal debtor/borrower for two term loan facilities given by the appellant to the principal debtor and a claim against the respondent/second defendant Spring Hill Bioventures Sdn Bhd for two letters of undertaking executed by them and given to the appellant for the two term loan facilities taken by Alpha Biologics Sdn Bhd. Alpha Biologics Sdn Bhd was wound-up on 16 May 2016 and did not defend against the claim. The trial then proceeded with the appellant's claim against the respondent/second defendant which rests principally on the true nature of the two letters of undertaking: whether the two letters of undertaking constitute letters of indemnity or whether they are in fact letters of guarantee. At the end of a full trial, on 1 August 2017, the High Court held that the two letters of undertaking were in fact letters of guarantee and consequently dismissed the appellant's claim against the respondent for RM35,741,572.65 under the first term loan facility and dismissed part of the appellant's claim for RM1,940,567.86 under the second term loan facility. The appellant, dissatisfied with the High Court's decision, now appeal to us. For ease of reference we will call Bank Pembangunan Malaysia Berhad as the appellant creditor, the first defendant as Alpha Biologics or borrower and Spring Hill Bioventures Sdn Bhd as the respondent surety and the two letters of undertaking as the impugned letters.

Background Facts

[2] The appellant is a financial institution incorporated in Malaysia. Alpha Biologics and the respondent are both private limited companies incorporated in Malaysia. The appellant creditor gave two term loan facilities to the borrower Alpha Biologics and the respondent surety gave two letters of undertaking ('impugned letters') to the appellant for the two term loan facilities taken by Alpha Biologics.

First Term Loan Facility

[3] The first term loan facility in the amount of RM20 million was granted to Alpha Biologics pursuant to letters of offer dated 6 December 2005, 30 May 2006, 16 June 2006 and a first term loan agreement dated 25 July 2006.

[4] As one of the securities pursuant to cl. 17 of the letter of offer dated 6 December 2005 ('6 December 2005 letter of offer'), the appellant creditor had initially requested for a "letter of awareness comfort with assurance that

A the project is viable throughout the tenure of the loan from the ultimate shareholders, namely Khazanah Nasional Berhad, Great Eastern Life Assurance (M) Berhad, Pacificmas Fidelity Sdn Bhd and TH Group Berhad."

[5] The 6 December 2005 letter of offer also made reference to a condition precedent in cl. 19 (viii) that the appellant creditor "BPMB shall B have received undertakings from the existing ultimate shareholders that they shall not divest their investment in the company until full settlement of the bank's loan, in the form satisfactory to BPMB."

[6] The security in cl. 17 of the 6 December 2005 letter of offer was subsequently amended in the letter of offer dated 30 May 2006 ('30 May C 2006 letter of offer'), where the appellant creditor had then requested for a letter of undertaking from the respondent surety to cover any shortfall for the company during the tenure of the facility and to meet all repayments under the facility in the event that Alpha Biologics is unable to meet its debt obligations under the facility agreement.

D

[7] In compliance with the appellant creditor's requirement, the respondent surety had issued a letter of undertaking (the first impugned letter) to the appellant as security for the first term loan facility granted to the Alpha Biologics. The first impugned letter provides as follows:

E

> In consideration of your granting or continuing to make available the term loan facility of Ringgit Malaysia Twenty Million (RM20,000,000.00) only ("the term loan") or any other accommodation for so long as you may think fit to Alpha Biologics Sdn Bhd (Company No. 606545-H) of Suite 3.02, Level 3, Wisma E & C, No. 2, Lorong Dungun Kiri, Damansara Heights 50490 Kuala Lumpur ("the borrower") *we, hereby declare, confirm* F *and undertake that we shall upon demand by you, cover any shortfall in the obligations of the borrower during the tenure of the term loan and to meet all repayments under the term loan in the event the borrower is unable to meet its debt obligations under the Loan Agreement* executed or to be executed between the borrower and you.

G **[8]** The first term loan facility was also secured by, *inter alia*, debentures executed by Alpha Biologics on 25 July 2006 in the sum of RM20 million, ie, first debenture is over the project assets and the second debenture over all of Alpha Biologics movable and immovable assets, deed of assignment created by Alpha Biologics on 25 July 2006 over the appellant's rights and benefits of the land and building under a tenancy agreement dated 19 March H 2004 between Alpha Biologics and Penang Development Corporation ('PDC') ('first assignment') and memorandum of deposit dated 25 July 2006 by the respondent over a fixed deposit of RM5 million ('first MOD').

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Second Term Loan Facility

[9] The second term loan facility in the amount of RM10 million was granted to Alpha Biologics pursuant to a letter of offer dated 23 October 2009, and a second term loan agreement dated 22 December 2009. The appellant creditor granted to Alpha Biologics additional banking facilities comprising:

(i) RM5 million term loan;

(ii) RM2 million term loan; and

(iii) RM3 million revolving credit facility ('RC facility').

[10] The following securities were provided under the second term loan facility:

(i) debenture created by Alpha Biologics on 22 December 2009 over the project assets ('third debenture');

(ii) debenture created by Alpha Biologics on 22 December 2009 over all Alpha Biologics' present and future assets both movable and immovable ('fourth debenture');

(iii) supplemental deed of assignment executed by the respondent surety on 22 December 2009 over all rights and benefits of the land and building under the tenancy agreement ('supplemental assignment');

(iv) second impugned letter dated 9 December 2009, the terms of which are identical to the first impugned letter save for the amount of the facility granted; and

(v) supplemental memorandum of deposit by respondent over a fixed deposit of RM5 million on 22 December 2009 ('supplemental MOD').

[11] In a letter dated 3 June 2011, the appellant creditor requested for Alpha Biologics to make payment due to the appellant in the sum of RM4,090,115.84 under the first term loan facility and in the sum of RM532,019.69 under the second term loan facility. This total to RM4,622,135.53. In this letter, the appellant had stated that it had no objection to Viropro Inc acquiring all the shares in Alpha Biologics.

[12] Subsequently, in a letter dated 8 September 2011, the appellant's solicitors, Messrs Lee Hishammuddin Allen & Gledhill notified Alpha Biologics that it was in default of its repayment obligations as provided for under the terms and conditions of the first term loan facility and the second term loan facility. The appellant's solicitors further informed that as at 10 August 2011, Alpha Biologics was further indebted to the appellant surety in the sum of RM4,599,422.69 under the first term loan facility and in the sum of RM759.042.83 under the second term loan facility. This totalled to RM5,358,465.52.

[13] In a letter dated 25 October 2012, the appellant's solicitors once again notified Alpha Biologics that it was in default of its repayment obligations as provided for under the terms and conditions of the first term loan facility and the second term loan facility. The appellant's solicitors further informed that as at 9 October 2012, Alpha Biologics was further indebted to the appellant in the sum of RM11,376,366.49 under the first term loan facility, in the sum of RM2,480,007.95 under the second term loan facility and in the sum of RM138,447.53 under a third term loan facility, which the respondent has no knowledge of. The total sum due under the first and second term loan facilities comes up to RM13,856,374.44. It is to be observed that all the three letters dated 3 June 2011, 8 September 2011 and 25 October 2012 were letters addressed to Alpha Biologics and not addressed nor copied to the respondent surety.

[14] On or about 31 July 2014, the appellant's solicitor issued a letter of termination to Alpha Biologics ('31 July 2014 letter'), informing of, *inter alia*, the following that:

(i) Alpha Biologics had allegedly failed to adequately and to the satisfaction of the appellant remedied all the breaches as set out in the previous letters sent to Alpha Biologics; and

(ii) Alpha Biologics is in default of its payment obligations under the first and second term loan facilities.

The letter of termination terminated the two term loan agreements and recalled the first and second term loan facilities and further demanded payment of the outstanding amount of RM31,908,811.70 as at 16 July 2014 from Alpha Biologics. This letter of termination was copied to the respondent surety. It is to be observed that no demand was made against the respondent surety of the outstanding amount claimed in the termination letter dated 31 July 2014 and the said letter was merely copied to the respondent surety.

[15] On 6 June 2016 the appellant's solicitors by a letter dated the same issued a letter of demand to the respondent surety for the amount of RM35,741,572.65 under the first term loan facility and RM1,940,567.86 under the second term loan facility as at 25 April 2016. The letter of demand was pursuant to the two letters of undertaking/impugned letters issued by the respondent surety to the appellant creditor for the two term loan facilities granted to Alpha Biologics. About a month later, on 14 July 2016, a second letter of demand was issued to the respondent surety demanding for the same.

[16] On 30 August 2016, the appellant creditor initiated this suit to claim for RM35,741,572.65 for the first term loan facility and RM1,940,567.86 for the second term loan facility against the borrower Alpha Biologics and the respondent surety. Since the borrower Alpha Biologics has wound up and

did not defend the claim, the suit proceeded against the respondent surety premised on the two letters of undertaking/impugned letters given to the appellant creditor by the respondent surety for the two term loan facilities.

High Court Decision

[17] The High Court identified three main issues as follows:

(i) whether the letters of undertaking/impugned letters are in law letters of indemnity or letters of guarantee;

(ii) if the letters of undertakings/impugned letters are guarantees, whether the respondent surety's liability has been discharged under ss. 86 and 88 of the Contracts Act 1950 as a result of the variations in the letters of offer; and

(iii) whether the appellant creditor is obliged to notify the respondent surety that Alpha Biologics had defaulted and demand for payment within the tenure of the first and second term loan facilities.

[18] The High Court then made its findings as follows:

(i) the two letters of undertaking/impugned letters dated 21 June 2006 and 9 December 2009 are in effect contracts of guarantee under s. 79 of the Contracts Act.

(ii) the respondent had been completely discharged of its obligation under the first impugned letter (first letter of undertaking) as a result of variation to the letter of offer. Section 88 of the Contracts Act 1950 applies.

(iii) the respondent had been discharged of its liability under the second impugned letter (second letter of undertaking) as a result of variation to the letter of offer for all transactions subsequent to the variation ie, 26 July 2010.

(iv) the appellant was obliged to notify the respondent surety that the borrower Alpha Biologics had defaulted and demand for payment within the tenure of the first and second term loan facilities.

[19] Pursuant to the findings, the High Court gave the following orders:

(i) in relation to the appellant creditor's claim against the respondent surety under the first term loan, the appellant's claim is dismissed;

(ii) in relation to appellant creditor's claim against the respondent surety under the second term loan, the respondent is released from liabilities with effect from the date of variation of the second term loan, ie, 26 July 2010;

(iii) the amount owed and due are to be determined by the court. (Subsequently, the respondent surety was ordered to pay RM932,472.10 under the second term loan as at 26 April 2016 at 1.75% interest per annum); and

(iv) appellant creditor to pay costs of RM40,000 to the respondent surety.

Our Decision

[20] The appellant creditor submitted that the two impugned letters constitute contracts of indemnity under s. 77 of the Contracts Act 1950 (Act 136) and not contracts of guarantee under s. 79 of the same. The appellant creditor submitted that the learned judge in holding that the two impugned letters are contracts of guarantee had erroneously relied on the case of *Ginlon (M) Sdn Bhd v. MBf Finance Bhd* [2004] 2 CLJ 169; [2004] 2 MLJ 641.

[21] The appellant creditor further submitted that the Indian authorities on guarantee under s. 126 of the Indian Contracts Act, which is *pari materia* to our s. 79 Contracts Act 1950, shows that in order to constitute a contract of guarantee it is necessary to prove that the principal debtor/borrower had expressly requested the guarantor to act as surety. In our instant case, there was no such request from the principal debtor Alpha Biologics to the respondent surety and as such the impugned letters are not letters of guarantee.

[22] Further, learned counsel for the appellant argued that since the two impugned letters are letters of indemnity, the issue of the surety being discharged under s. 86 of the Contracts Act, which section is applicable only to contracts of guarantee, does not arise.

[23] On the issue of notification, in that the appellant is obliged to notify the respondent surety that the borrower Alpha Biologics had defaulted and the demand for payment from the respondent surety must be within the tenure of the first and second term loan facilities, the appellant argued that the impugned letters do not impose such an obligation. There is no such term provided in the impugned letters.

[24] On the other hand, the respondent surety in response, submitted that the impugned letters are in effect contracts of guarantee under s. 79 of the Contracts Act.

[25] The respondent surety argued that the case of *Ginlon (supra)* is applicable since it canvassed the legal principle of suretyship pursuant to s. 79 of the Contracts Act and that there is no requirement under s. 79 which state that to constitute a guarantee there must be an express request from the principal debtor Alpha Biologics to the respondent to be its surety.

[26] Counsel for the respondent argued that since the requirements of a guarantee are met, the impugned letters are in effect letters of guarantee and the respondent surety is discharged from its liabilities under ss. 86 to 89 of the Contracts Act as a result of the variations made between the appellant and the borrower Alpha Biologics in that the appellant had unlawfully varied the first and second letters of guarantee without the knowledge and consent of the respondent surety.

[27] Further, learned counsel for the respondent argued that the appellant creditor had failed to notify the respondent surety of the existence of the borrower Alpha Biologics' default during the tenure of the term loan facilities. This failure on the part of the appellant creditor had discharged the respondent surety, especially so, when the demands made to the respondent surety for the payment of the full facilities were made after the termination and recall of the facilities on 31 July 2014, and, without any prior notification to the respondent surety of the default by the borrower Alpha Biologics during the subsistence of the facilities.

[28] To truly appreciate whether the impugned letters are letters of indemnity or guarantee, let us peruse the impugned letters dated 21 June 2006 and 9 December 2009 executed by the respondent surety for the two term loan facilities granted to the borrower Alpha Biologics. The wordings of the impugned letters are identical except for the amount/value of the loan facilities given, one at RM20 million and the other, RM10 million for the first and second term loan facilities respectively.

[29] The first and second impugned letters read as follows:

(i) the first impugned letter

Date: 21st June 2006

BANK PEMBANGUNAN MALAYSIA BERHAD
[formerly known as BANK PEMBANGUNAN
DAN INFRASTRUKTUR MALAYSIA
BERHAD]
28th Floor, Menara Bank Pembangunan
Bandar Wawasan
No. 1016, Jalan Sultan Ismail
50250 Kuala Lumpur

Dear Sirs,

Re: Term Loan facility of RM20,000,000.00

Lender: Bank Pembangunan Malaysia Berhad (formerly known as Bank Pembangunan Dan Infrastruktur Malaysia Berhad (Company No: 16562-K)

Borrower: Alpha Biologics Sdn Bhd (Company No. 606545-H)

In consideration of your granting or continuing to make available the Term Loan Facility of Ringgit Malaysia Twenty Million (RM20,000,000.00) only ("the Term Loan") or any other accommodation for so long as you may think fit to Alpha Biologics Sdn Bhd (Company No. 606545-H) of Suite 3.02, Level 3, Wisma E & C, No. 2, Lorong Dungun Kiri, Damansara Heights 50490 Kuala Lumpur ("the borrower") we, *hereby declare, confirm and undertake that we shall upon demand by you, cover any shortfall in the obligations of the borrower during the tenure of the Term Loan* and to meet

A all repayments under the Term Loan and to meet its debt obligations under the Loan Agreement executed or to be executed between the borrower and you.

Yours faithfully,

B ... ...
Director Director
DR RAJA LOPE BIN RAJA SHAHROME YEO KENG UN

(emphasis added)

C (ii) the second impugned letter

Date: 9 Dec 2019

BANK PEMBANGUNAN MALAYSIA BERHAD
Level 16, Menara Bank Pembangunan
Bandar Wawasan
D No. 1016, Jalan Sultan Ismail
50250 Kuala Lumpur

Re: Banking Facilities of RM10,000,000 comprising of Term Loan 1 of RM5,000,000 Term Loan 2 of RM2,000,000 and Revolving Credit of RM3,000,000 (collectively the Banking Facilities)

E Lender: Bank Pembangunan Malaysia Berhad (Company No. 16562 K)

Borrower: Alpha Biologics Sdn Bhd (Company No. 606545 H)

In consideration of your granting or continuing to make available the Banking Facilities of Ringgit Malaysia Ten Million
F (RM10,000,000.00) only or any other accommodation for so long as you may think fit to Alpha Biologics Sdn Bhd (Company No. 606545-H) a company incorporated in Malaysia and having its place of business at No. 23, Lorong Idaman 3/1, Taman Idaman, 14100 Simpang Ampat, Penang ("the Borrower") we, *hereby declare,*
G *confirm and undertake that we shall upon demand by you, cover any shortfall in the obligations of the Borrower during the tenure of the Banking Facilities* and to meet all repayments under the Banking Facilities and to meet its debt obligations under the Loan Agreement executed or to be executed between the Borrower and you.

Yours faithfully,

H ... ...
Dr Raja Lope Bin Raja Shahrome Amirul Fares Bin Wan Zahir

(emphasis added)

[30] It is not in dispute that the impugned letters are not expressly termed
I as guarantees. To determine whether the impugned letters are letters of indemnity or guarantee, guidance can be sought from ss. 77 and 79 of the Contracts Act 1950. Section 77 defines a contract of indemnity while s. 79 defines a contract of guarantee. Sections 77 and 79 read as follows:

"Contract of indemnity"

77. A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a "contract of indemnity".

ILLUSTRATION

A contracts to indemnify B against the consequences of any proceedings which C may take against B in respect of a certain sum of RM200. This is a contract of indemnity.

"Contract of guarantee", "surety", "principal debtor" and "creditor"

79. A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety"; the person in respect of which default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor". A guarantee may be either oral or written.

[31] Under s. 77, a "contract of indemnity" is a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person. A contract of indemnity is therefore, according to a string of authorities, to be nothing more than "a contract by one party to keep the other harmless against loss" (*Yeoman Credit Ltd v. Latter* [1961] 1 WLR 828 at pp. 830 to 831; *Total Oil Products (Australia) Pty Ltd v. Robinson* [1970] 1 NSWR 701 and 703; and *Davys v. Buswell* [1913] 2 KB 47 at pp. 53 to 55). It is a contract to indemnify the other party against any loss. And that the obligation has no reference in law to the debt of another (see *Clipper Maritime Ltd v. Shirlstar Container Transport Ltd (The Anemone)* [1987] 1 Lloyd's Rep 546 at p. 555; and *Harburg India Rubber Comb Co v. Martin* [1902] 1 KB 778 at p. 784).

[32] Under a contract of guarantee, there must be three parties involved: the surety, principal debtor/borrower and the creditor. A contract of guarantee is therefore an undertaking to guarantee the obligations of a named principal. In this regard, a contract of guarantee is essentially a collateral contract by which a guarantor/surety undertakes to answer for the default of the principal debtor/borrower who is to be primarily liable to the creditor. The guarantor therefore only owes a secondary obligation to the creditor to make good the particular defaults of the principal debtor. (see the cases of *South East Asia Insurance Bhd v. Nasir Ibrahim* [1992] 4 CLJ 1801; [1992] 1 CLJ (Rep) 295; [1992] 2 MLJ 355 and *Yeoman Credit Ltd v. Latter & Anor* [1961] 2 All ER 294).

[33] In the book *Banking Law*, 4th edn, LexisNexis by Lee Mei Pheng, Detta Samen and Ivan Jeron Detta, the authors at p. 873, citing the cases of *Sia Siew Hong & Ors v. Lim Gim Chian & Anor* [1996] 3 CLJ 26; and *The Pacific Bank Bhd v. Vimla Textiles & Ors* [2004] 6 CLJ 406 stated as follows:

> The main difference between a guarantee and an indemnity is that in the case of a guarantee, there must be three parties involved whereas in the case of an indemnity, two parties may be sufficient. In the construction of a document - whether it is a guarantee or an indemnity - the court is not bound by the label affixed onto that particular document. The duty of the court is to construe the document as a whole and to determine from its language and any other admissible evidence its true nature and purport.

[34] Further, the book in citing the case of *Leong Weng Choon v. Consolidated Leasing (M) Sdn Bhd* [1998] 3 CLJ 619; [1998] 3 MLJ 860 and *Pau Ngie Siong & Anor v. Kontiki Trading Pte Ltd* [2000] 3 CLJ 560; [2000] 4 MLJ 129, stated as follows:

> In a guarantee agreement, where the principal debtor is not liable to the creditor, the guarantor is similarly not liable. For a guarantee to operate, s. 86 Contracts Act 1950 definitely requires the three parties - the 'surety', the 'principal debtor' and the 'creditor' - and for a contract of indemnity, it is sufficient if it involves only two persons or parties.

[35] Thus, having regard to the fact that a court has to construe a document as a whole, taking into consideration the language used and the other admissible evidence to determine the true nature and purport of the document and not just be bound by the label affixed onto a particular document, has the learned judge in this case taken the correct approach with regard to the construction of the impugned letters? The learned judge at para. [24] of her grounds of judgment (GOJ) referred to the cases of *Woo Yew Chee v. Yong Yong Hoo* [1978] 1 LNS 240; [1979] 1 MLJ 131 and *Addiscombe Garden Estates Ltd v. Crabbe* [1958] 1 QB 513 on the need to always look beyond the terminology of an agreement to the actual facts of the situation in the construction of a document.

[36] The learned judge had applied/adopted the objective approach taken/propounded by the Supreme Court in *Malayan Banking Bhd v. PK Rajamani* [1994] 2 BLJ 166; [1994] 1 MLJ 405 at p. 410, where in referring to *Woo Yew Chee (supra)*, the court stated that "the correct approach would be to look at the substance, not just the label which had been attached to the letter." (see also *Bekalan Sains P&C Sdn Bhd v. Bank Bumiputra Malaysia Bhd* [2011] 1 LNS 232; [2011] 5 MLJ 1 at pp. 57 to 58 [152]). The learned judge went further by referring to the Court of Appeal's case of *Cipta Cermat Sdn Bhd v. Perbandaran Kemajuan Negeri Kedah* [2007] 1 CLJ 498; [2007] 2 MLJ 746 where in reference to the case of *Bank of Credit and Commerce International SA v. Ali & Ors* [2002] 1 AC 251, the court stated that essentially the approach in construction of a document is an objective approach and the court is not concerned with the subjective intention of the parties but their imputed intention that is relevant. In other words, "the meaning of the agreement is to be discovered from the words which they have used read in the context of the circumstances in which they made the agreement." And in interpreting contracts, it should best elucidate the commercial purpose of the contract in

that it should not defy business logic but "must be construed in such a way as to make it conform to business logic" (see Court of Appeal's case of *Bon Chong Hing & Anor v. Gama Trading Company (Hong Kong) Ltd* [2011] 6 CLJ 493).

[37] Having perused the GOJ, we are thus satisfied that the learned judge had used the correct principle in the construction of a document. The question here then is whether the principle was correctly applied to the facts and circumstances of the case.

[38] As stated earlier, the appellant submitted that the two impugned letters constitute contracts of indemnity under s. 77 of the Contracts Act and not contracts of guarantee under s. 79 of the same. The appellant submitted that the learned judge in holding that the two impugned letters are contracts of guarantee had erroneously relied on the case of *Ginlon (supra)*. In relying on *Ginlon*, the learned judge did not appreciate that the facts and issues in *Ginlon* (*supra*) were different in that in *Ginlon* (*supra*), the appellant sought to argue that s. 86, which was applicable to a guarantee, was applicable to a National Land Code (NLC) charge. Learned counsel argued that the principal issue in *Ginlon* (*supra*) was whether a NLC charge fell within the definition of a guarantee under s. 79 and not whether a letter of undertaking was a guarantee. And further, the Court of Appeal's attention in that case was not drawn to s. 126 of the Indian Contracts Act (which is equivalent to s. 79, Contracts Act 1950), and to the relevant Indian authorities on that section.

[39] The appellant further submitted that the Indian authorities on guarantee under s. 126 of the Indian Contracts Act, which is in *pari materia* to s. 79 Contracts Act 1950, shows that in order to constitute a contract of guarantee it is necessary to prove that the principal debtor/borrower had expressly requested the guarantor to act as surety. This means that there is a requirement for a third contract between the debtor/borrower and the surety apart from a contract between the creditor and the borrower and a contract between the creditor and the surety. Learned counsel for the appellant argued that in our instant case, there was no such request made by the borrower Alpha Biologics to the respondent surety to give the letters of undertaking to the appellant creditor. In fact, the request was made directly by the appellant creditor to the respondent surety to give the letters of undertaking. In such circumstances, learned counsel argued there was no basis for the learned judge to infer from the letters of offer dated 6 December 2005 and 30 May 2006 that the borrower Alpha Biologics had impliedly requested for the respondent surety to be its surety and as such there was no third contract entered and the two impugned letters are therefore letters of indemnity and not guarantee. The three Indian cases on s. 126 of the Indian Contracts Act of *Ramchandra B Loyalka v. Shapurji N Bhownagree* AIR [1940] Bom 315 at pp. 316 to 317; *KV Periyamianna Marakkayar & Ors v. Banians And*

Co AIR 1926 Mad 544 at pp. 549 to 550 and *Janwatraj v. Jethmal* AIR [1958] Raj 343 which held that there must be a third contract between the principal debtor and the surety for it to be a contract of guarantee are cited in support.

[40] On the other hand, the respondent argued that the case of *Ginlon* (*supra*) is applicable since it canvassed the legal principle of suretyship pursuant to s. 79 of the Contracts Act 1950 and that there was no requirement under s. 79 which state that to constitute a guarantee there must be an express request from the principal debtor/borrower Alpha Biologics to the respondent to be its surety.

[41] We find that the learned judge, having considered the evidence before the court, had rightfully found that s. 79 does not require an express third contract between the principal debtor Alpha Biologics and the surety respondent for it to constitute a contract of guarantee. Further, the learned judge had correctly inferred by looking at the letters of offer from the appellant dated 6 December 2005 and 30 May 2006, which were addressed to Alpha Biologics, that it was the appellant creditor who had made the request to the borrower Alpha Biologics to provide the letters of undertaking and not the appellant creditor who had made the request directly to the respondent surety. By implication, the learned judge had inferred, which inference was correct, to come to the conclusion that the suretyship must have been undertaken at the request of Alpha Biologics. This thus satisfied the requirement that the request from the principal debtor or borrower to the surety need not be done expressly but can be implied, as in this case, from the surrounding circumstances of the case.

[42] Thus, we agree with the respondent's submission that DW1 in evidence has merely referred to the appellant's "request" for a letter of undertaking pursuant to the terms in the letters of offer and not that the appellant had directly requested for an "undertaking" from the respondent.

[43] This is evident from Q&A18 where DW1 went on to say that the first impugned letter was issued pursuant to the appellant's request to "fulfill the requests as per the letter dated 30 May 2006" as well as Q&A23 and 24 in relation to the second impugned letter. There was no evidence led at trial by the appellant that the request to provide the impugned letters/letters of undertaking came from them directly to the respondent. Thus, from the evidence of DW1 and by construction, looking at the letters of offer addressed to Alpha Biologics, we can safely deduct that the appellant made the request to Alpha Biologics; the request was not made by the appellant to the respondent and correspondingly, it cannot be credibly disputed that the suretyship has been undertaken at the request of the principal debtor Alpha Biologics to the respondent.

[44] Further, it was not the appellant's case in their statement of claim that the appellant themselves had issued the request for the letter of undertaking directly to the respondent. In this scenario, since the implication is that

Alpha Biologics had impliedly requested the respondent to be its guarantor or surety, then, both the cases of *Ramchandra (supra)* and *KV Periyamianna (supra)* that the guarantor's obligation is undertaken pursuant to either an express or implied request by the principal debtor has been met. In other words, the cases cited by the appellant do not propound that the request must be express. Suffice that the request can be implied, as in our instant case, through the facts of the case.

[45] To summarise, it is therefore clear that there is no requirement for an express agreement or contract between the principal debtor and the guarantor for it to constitute a contract of guarantee. Suffice that the principal debtor's request may be derived by inference. In other words, it is implied through the documents and evidence of DW1. In the case of *Nagpur Nagarik Sahakari Bank Ltd v. Union of India* 1881 SCC Online AP 19; (1981) 1 AP LJ 316; (1981) 1 AP LJ (SN 2) 23; AIR 1981 AP 153; (1981) 1 ALT 235; (1981) 1 ALT (NRC) 39; (1984) 55 Comp Cas 677 which is a case on guarantee, the High Court of Andhra Pradesh at Hyderabad held at its footnote as follows:

> Held:
>
> Under s. 124 of the Contract act, no doubt the contract is bilateral as only two parties are involved, namely, the promisor and the promisee. The promissory promises to make good the loss though caused by a third party. This gives rise to the contract of indemnity, whereas s. 126 of the Contract Act gives rise to a contract of guarantee wherein three persons are involved. Under this section, a party who promises to discharge the liability of a third person in case of his default and gives guarantee, is called the "surety"; the person in respect of whose default the guarantee is given is called the principal debtor; and the person to whom the guarantee is given is called the "creditor". The last sentence in this section, *viz.*, "A guarantee may be either oral or written" has special significance. This contract is, therefore, trilateral unlike the contract of indemnity which, as stated earlier, is bilateral. Where, the contract is one of indemnity, the non- liability of the principal debtor does not affect the obligation undertaken by the indemnifier which is primary, whereas every contract of guarantee is not a contract of indemnity, for, in the absence of special circumstances the liability of a surety is only ancillary and can rest only on a valid obligation on the part of the party whose debt or obligation is guaranteed.
>
> *A Contract of guarantee is no doubt tripartite in nature but it is not necessary or essential that the principal debtor must expressly be a party to that document. It is adequate if his obligation is established by implication*. The surety's liability is co-extensive with that of the principal debtor unless otherwise by special provision it is so varied. In the instant case, the liability of the bank, reading Exts A-1 and A-2 in combination, is that of surety and therefore, the assurance which has been given by it is one of guarantee and not an indemnity. The suit to enforce a contract a guarantee can succeed even if the plaintiff has not exhausted his remedies against the principal debtor.
>
> (emphasis added)

[46] Thus, based on the evidence led before the High Court, the learned judge made the following findings of fact as follows:

(i) DW1 had merely referred to the appellant's "request" pursuant to the terms of the letters of offer and not that the appellant had directly requested for an "undertaking" from the respondent.

(ii) There is no evidence that the request to provide the letters of guarantee came from the appellant.

(iii) By construction, the appellant made the request to Alpha Biologics; the suretyship must have been undertaken at the request of Alpha Biologics as it is not the appellant's case that the appellant themselves had issued the request directly to the respondent.

(iv) Based on the Indian authorities cited, there is no requirement for an express contract between the principal debtor and guarantor for it to constitute a contract of guarantee as the principal debtor's request may be derived from inference.

[47] Therefore, we find that the learned judge had not erred, but is correct in finding that Alpha Biologics had impliedly requested the respondent to stand as guarantor/surety to the two term loan facilities taken by them from the appellant and as such the requirement propounded in the two Indian cases of *Ramchandra (supra)* and *KV Periyamianna (supra)* for a contract to be defined as a contract of guarantee has been fulfilled.

Construction Of The Impugned Letters

[48] As to the construction of the letter of indemnity, we agree with the respondent's submission that applying the law to the present facts, the learned trial judge correctly found that although the impugned letters employed the phrase "... we hereby declare, confirm and undertake ...", what is important is the purport of the letter, which is in fact that of a contract of guarantee pursuant to s. 79 of the Contracts Act. Construing the impugned letters as a whole, it cannot be disputed that the commercial purport of the documents was that the respondent surety, in consideration of the appellant creditor making available the facilities to the borrower Alpha Biologics, undertakes to cover any shortfalls and meet all repayments under the two term loan facilities. The learned judge is thus correct to find the two impugned letters to be letters of guarantee.

Whether The Impugned Letters Expressly Require The Appellant Creditor To Notify The Respondent Surety Of Alpha Biologics Default

[49] The obligation to pay by the respondent surety rest upon a demand being made by the appellant creditor to the respondent surety. In that, we are of the view that the learned judge is wrong in finding that the appellant must notify the respondent of Alpha Biologics default. We are in agreement with the appellant that the impugned letters do not impose an obligation to

give such notice to the respondent surety of Alpha Biologics default. Thus the fact that no notices were given is not fatal. Suffice that a demand is made to the respondent. In this case, the demand by the appellant creditor to the respondent surety was made on 6 June 2016 which is about two years after the appellant had terminated the contract and recalled the facilities on 31 July 2014. The obligation to pay by the appellant surety thus arose only from that date, ie, 6 June 2016.

Whether The Respondent Surety's Liabilities Had Been Discharged Under ss. 86 And 88 Of The Contracts Act 1950 As A Result Of The Variations In The Letters Of Offer

[50] There is no dispute that the first term loan facility and the second term loan facility were varied. The first term loan facility was varied *vide* the appellant's letter dated 23 October 2009 in the following manner:

(i) the original grace period of three years to commence repayment of the principal amount was varied to four years from the date of first drawdown; and

(ii) the original terms whereby repayment commences on the 37th month and the principal repayment is to be paid in 83 equal installments and one further final installment was varied to the effect that the repayment of the principal amount and the repayment now commences on the 49th month and the principal repayment is to be made in 72 equal installments. Arising thereof, interest for the 37th month to the 48th month was to be capitalised.

[51] The second term loan facility was varied *vide* the appellant's letter dated 26 July 2010 in the following manner:

> The form of the revolving credit facility will include a bank guarantee and the purpose of the second term loan facility was varied to part-finance the purchase of raw materials as well as pre-expenditure for obtaining a cGMP certificate.

[52] It is not in dispute that the variations were done to both the term loan facilities without the consent of the respondent surety. In fact, the respondent surety only came to know about the variations to both the term loan facilities on or about the month of July 2016 arising from a due diligence undertaken by the respondent on Alpha Biologics emanating from the letters of demand dated 6 June 2016 and 14 July 2016 issued by the appellant's solicitors to the respondent.

[53] The High Court Judge found at paras. 46 and 47 of the GOJ that the variation of time in the first term loan facility to commence repayment of the principal amount from the original grace period of three years to four years from the date of first drawdown has prejudiced the respondent and attracts the provisions of ss. 86 and 88 Contracts Act 1950 and completely discharge the respondent from the terms of its guarantee under the first impugned letter. Paragraphs 46 and 47 of the GOJ are as follows:

A [46] According to DW1's evidence, the compression of the loan repayment came at a time where the second defendant would no longer be making investments but rather realizing the returns on investment; the effect of which the second defendant would have had to make additional repayments at the estimated increase of 23% at the time it would have been focusing on monetising its investments. Further the grant of time
B gave the first defendant a 1 year extension of time to commence repayment of the principal amount which means that the first defendant has now contracted with the Plaintiff, without the consent of the second defendant, to defer repayment of the principal amount until a whole year later. *I find this variation has prejudiced the second defendant as it would no longer*
C *have the right to sue the first defendant for repayment during the original 37th to 48th months if the Plaintiff had called on the guarantee upon a default but the second defendant would have to wait till the 49th month to sue the first defendant*.

[47] I find the grant of time by the Plaintiff to the first defendant had resulted in the substitution of the terms of the 6/12/2005 letter of offer and 30/5/2006 letter of offer. Applying the principles from *Amrit Lal*
D *Goverdhan Lalan (supra)* and *T.N.S. Firm (supra)* to the evidence at hand, in my judgment, the variations to the first term loan facility which are in no way *de minimis* but are very material attracts the provisions of ss. 86 and 88 CA 1950 and completely discharges the second defendant from the terms of its guarantee under the first impugned letter.

E (emphasis added)

[54] On the second term loan, the High Court Judge found at paras. 51 and 52 of the GOJ that since there was variation, though not material, the fact that the second impugned letter does not contain any express waiver of the respondent's right in respect of variation, has attracted s. 86 of the Contracts
F Act, resulting in the respondent being discharged of its liabilities under the second impugned letter for all transactions subsequent to the variation. Paragraphs 51 and 52 of the GOJ are as follows:

[51] DW1 was candid during cross-examination to a question posed by Plaintiff's Counsel that the variation of the second term loan facility
G whilst affecting the second defendant's liability under the second Impugned Letter was not material. Notwithstanding this, I agreed with the second defendant's submission that s. 86 CA 1950 "will bite on the facts as there was a variation on the terms of the loan granted without the consent of the second defendant." coupled with the fact that the second Impugned Letter does not contain any express waiver of its right
H in respect of variation as I have alluded at paras 35 and 38 above.

[52] For the given reasons, I find that the second defendant has been discharged of its liabilities under the second Impugned Letter for all transactions subsequent to the variation.

I **[55]** It must be noted that there is a difference between ss. 86 and 88 of the Contracts Act. Section 86 discharges the guarantor partly, ie, the guarantor is discharged subsequent to the variation and s. 88 discharges the guarantor completely. For ease of reference, ss. 86 and 88 are reproduced below:

Section 86. Discharge of surety by variance in terms of contract.

Any variance, made without the surety's consent, in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance.

ILLUSTRATIONS

(a) A becomes surety to C for B 's conduct as a manager in C's bank. Afterwards, B and C contract, without A 's consent, that B 's salary shall be raised, and that he shall become liable for one-fourth of the losses on overdrafts. B allows a customer to overdraw, and the bank loses a sum of money. A is discharged from his suretyship by the variance made without his consent, and is not liable to make good this loss.

(b) A guarantees C against the misconduct of B in an office to which B is appointed by C, and of which the duties are defined by law. By a subsequent law, the nature of the office is materially altered. Afterwards, B misconducts himself, A is discharged by the change from future liability under his guarantee, though the misconduct of B is in respect of a duty not affected by the later law.

(c) C agrees to appoint B as his clerk to sell goods at a yearly salary, upon A 's becoming surety to C for B 's duly accounting for moneys received by him as such clerk. Afterwards, without A's knowledge or consent, C and B agree that B should be paid by a commission on the goods sold by him and not by a fixed salary, A is not liable for subsequent misconduct of B.

(d) A gives to C a continuing guarantee to the extent of RM3,000 for any oil supplied by C to B on credit. Afterwards, B becomes embarrassed and without the knowledge of A, B and C contract that C shall continue to supply B with oil for ready money, and that the payments shall be applied to the then existing debts between B and C. A is not liable on his guarantee for any goods supplied after this new arrangement.

(e) C contract to lend B RM5,000 on the 1 March. A guarantees repayment. C pays the RM5,000 to B on the first January. A is discharged from his liability, as the contract has been varied, in as much as C might sue B for the money before the 1st of March.

Section 88. Discharge of surety when creditor compounds with, gives time to, or agrees not to sue principal debtor.

A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor, discharges the surety, unless the surety assents to such contract.

[56] As can be seen, s. 86 does not discharge the guarantor/surety's liabilities completely. Section 86 "discharges the surety as to transactions subsequent to the variance." Section 88 on the other hand, discharges the

surety's liabilities completely. The effect of the principle encapsulated in s. 86 of the Contracts Act is trite. The case of *Polak v. Everett* [1876] 1 QBD 669 was referred to in the Federal Court's case of *Citibank NA v. Ooi Boon Leong & Ors* [1980] 1 LNS 168; [1981] 1 MLJ 282, where Raja Azlan Shah CJ, (as His Majesty then was), had this to say:

> The section [86] provides express provision for the respondent to consent to any variations. **They are the sole judges whether or not they will consent to remain liable notwithstanding such variation, and that if they have not so consented, they will be discharged**.
>
> (emphasis added)

[57] Although the court held that the variations in *Citibank (supra)* fell within the *de minimis* principle, the court nevertheless held that the guarantors were bound by the variation as the contract of guarantee contained an express waiver of their rights in respect of any variation or alteration. However, in our instant case, the learned judge found and it is not disputed by the appellant, that the impugned letters do not contain any waivers of the respondent's rights under the Contracts Act. As such, it is clear, in that, in the absence of a waiver provision in the contract of guarantee, any variation without the guarantor's consent will discharge the guarantor.

[58] In our case, the question or the real issue is therefore whether the respondent's remaining liability is discharged under s. 88 of the Contracts Act 1950. For this, we agree with the appellant that one must examine the purpose of s. 88 of the Contracts Act 1950. The authorities on s. 135 Indian Contracts Act which is in *pari materia* with s. 88 of our Contracts Act 1950 indicate that the giving of time or indulgence alone does not attract s. 88 of the Contracts Act 1950.

[59] In the Indian Supreme Court's case of *Amrit Lal Goverdhan Lalan v. State Bank Of Travancore & Ors* AIR 1968 SC 1432, the court held as follows:

> What really constitutes giving of time is the extension of the period at which, by the contract between them, the principal debtor was originally obliged to pay the creditor by substituting a new and valid contract between the creditor and the principal debtor to which the surety does not assent. The reason why an agreement to give time discharges the surety is because *if, after making such an agreement, the creditor were to sue the surety the latter would at once be turned on the principal debtor in breach of the agreement to give time, so that the effect of such an agreement is to prevent 'the surety from either requiring the creditor to call upon the principal debtor to pay off the debt, or himself paying off the debt, and then suing the principal debtor, thereby causing prejudice to the surety* [*Rouse v. Bradford Banking Co* [1894] 2 Ch. 32, 75., per A. L. Smith, L.J.].
>
> (emphasis added)

[60] The rationale of the principle is perhaps explained by AL Smith, LJ in *Rouse v. Bradford Banking Co* [1894] 2 Ch 32 at p 75 as follows:

> It has long since been established that, if a creditor contracts with a principal debtor and a surety, and afterwards by a binding contract with the principal debtor he gives time to him without the consent and knowledge of the surety and without reserving his rights against the surety, the surety is discharged.
>
> Different reasons, given by different Judges, for this will be found in the books; but I apprehend that the main reason is that a surety is entitled at any time to require the creditor to call upon the principal debtor to pay off the debt, or himself to pay off the debt, and that when he has paid it off he is at once entitled in the creditor's name to sue the principal debtor; *and if the creditor has bound himself to give time to the principal debtor, the surety cannot do either the one or the other of these things until the time so given has elapsed, and it is said that by reason of this the surety's position is altered to his detriment without his assent*.
>
> (emphasis added)

[61] It must be stressed that the rational under s. 88 is that the surety/guarantor is discharged if "the guarantor/surety's position is altered to his detriment without his assent." In our instant case, the respondent's obligation under the first undertaking occurs when there is a "shortfall in the obligations of the borrower during the tenure of the term loan and to meet all repayments under the term loan in the event the borrower is unable to meet its debt obligations under the loan agreement executed or to be executed between the borrower and you."

[62] When the appellant creditor extended the grace or moratorium period and extended time for the principal repayment, the appellant creditor cannot call on the respondent surety to make payment until the extended period has lapsed. Consequently, the appellant creditor could never call on the respondent surety to make payment under the first undertaking before the extended grace period and extended time for the principal repayment had lapsed. The respondent/second defendant would have to wait till the 49th month to sue the borrower Alpha Biologics/first defendant."

[63] In such a scenario, the variation has no impact on the respondent's right to sue under the first term loan facility. What happened is just that the right to sue has been deferred to a later date. In such circumstances, the more suitable provision to invoke is s. 86 on variation and not s. 88 of the Contracts Act 1950 in that the respondent is thus discharged/released from liabilities not completely but with effect from the date of variation of the first term loan, ie, 23 October 2009.

A

Conclusion

[64] Based on the reasons given above, we unanimously allow in part the appellant's appeal with regard to the first term loan. The order of the High Court dated 1 August 2017 in para. 1 which dismissed the appellant's claim pertaining to the first term loan is set aside and substituted with a similar order as in paras. 2 and 3 of the same order. Consequently, the effect is that, like the second term loan, due to variation by the appellant which variation was without the consent of the respondent surety, the respondent is thereby discharged/released from liabilities with effect from the date of variation of the first term loan on 23 October 2009 under s. 86 of the Contracts Act.

B

C

[65] We also allow agreed costs of RM10,000 to the appellant subject to the payment of allocator.

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